IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 15TH MARCH 2007 / 24TH PHALGUNA 1928

Crl.Rev.Pet.No. 644 of 1998()

CRA.47/1998 of IVTH ADDL.SESSIONS COURT, ERNAKULAM
CC.372/1997 of JUDL.MAGISTRATE OF FIRST CLASS-I, ERNAKULAM
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REVN. PETITIONER(S): ACCUSED / APPELLANT

V.K.S. RAO, PROPRIETOR,
ORIENT SHIPPING AGENCY,
URGENT AUTOMOBILE BUILDING,
THOPPUMPADY, COCHIN 0 5.

BY ADV. SRI.T.O.XAVIER

RESPONDENT(S): COMPLAINANT/RESPONDENT & STATE
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1. PEIRCE LESLIE INDIA LTD.,
BRISTOW ROAD,
WILLINGDON ISLAND, COCHIN3,
REP.BY ITS ATTORNEY P.C. SASIKUMAR.

2. STATE OF KERALA, REP.BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

PUBLIC PROSECUTOR
R1 BY ADVS.SRI.SAJI MATHEW,
SRI.DENU JOSEPH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 15/03/2007 , THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

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ORDER ON CrL.M.P. 3328/1998 IN Crl.R.P. NO.644/1998

DISMISSED

15/03/2007 **SD/- K.HEMA, JUDGE**

TRUE COPY

P.A. TO JUDGE

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K.HEMA, J.

Crl.R.P.No.644 of 1998

Dated 15th day of March, 2007.

O R D E R

The revision petitioner challenges the conviction and sentence passed against him for offence under Section 138 of Negotiable Instruments Act. The accused was originally convicted and sentenced by Magistrate's Court to undergo simple imprisonment for three months and to pay a fine of Rs. 7,000/- and in default to undergo simple imprisonment for two months for the offence under Section 138 of the Act. It was also ordered that if the fine amount is realized, it shall be given to the complainant as compensation. In appeal, learned Additional Sessions Judge confirmed the conviction. But, sentence was altered to fine of Rs. 11,000/- out of which Rs. 10,000/- was ordered to be paid to the complainant. The said conviction and sentence are challenged in this revision.

2. According to prosecution, complainant is a Company. The accused was carrying on business as shipping agents under the name and style M/s. Orient Shipping Agency who used to avail services of complainant and settle the accounts later. On 31.07.1996, a sum of Rs. 6,819/- was due from the accused for the services rendered by the Company. He issued a cheque Exhibit P1 for the discharge of the said amount. The cheque on presentation was dishonoured on the ground 'funds insufficient'. A notice was sent, but it was not replied. Copy of the

notice is Ext. P4. No amount is paid despite the notice and hence a complaint was filed against the accused in accordance with the provisions of the Act.

3. Both the courts found that it is established that Ext. P1 cheque was issued by accused for the discharge of a debt and that the presumption available under Section 139 is not rebutted by accused. On going through the records in this case I find that in an offence under Section 138, prosecution is bound to prove that the cheque is drawn for the discharge of a debt or liability by accused. All ingredients of Section 138 of the Negotiable Instruments Act are to be established to constitute an offence under Section 138. But, there is no such proof in this case. PW1 was examined, who posed himself to be the representative of the complainant company. He has no case that he has any direct knowledge about the affairs of the company or the facts of this case. His case is that he is authorized as per Ext. P7 to conduct the case. A reading of Ext. P7 shows that PW1 was authorized to "present" the case in respect of M/s. Orient Shipping Agency, Cochin -5. M/s. Orient Shipping Agency is the proprietoryship of accused. There is nothing in Ext. P7 to show that the company has authorized PW1 to prosecute the case on behalf of complainant.

4. It is also most relevant to find that there is absolutely nothing in

the evidence of PW1 to indicate that he has any direct knowledge about the transactions which are alleged in the complaint. PW1 only stated that Ext. P1 is a cheque which was handed over by accused in respect of service charges which the accused owed. But, it is clear he has absolutely no direct knowledge about this fact. The drawing of cheque by accused is the most relevant fact which is to be proved in an offence under Section 138.

5. As per Section 59 of Indian Evidence Act, all facts, except the contents of documents or electronic records, may be proved by oral evidence. Section 60 of Indian Evidence Act shows that oral evidence must be direct. Oral evidence must, in all cases whatever, be direct. If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it. If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it. But, there is no direct evidence in this case regarding handing over of the cheque or drawing of the cheque. PW1 does not have a case that he had seen the accused handing over the cheque or doing anything relating to the cheque.

6. Learned counsel appearing for revision petitioner submitted that PW1 works in complainant company. Therefore, it has to be concluded that he is aware of the facts. I can only reject this argument, since it is without any basis at all. I can go only by the deposition given by PW1

which does not even disclose at least whether he is working in the complainant company. He did not say that he works in the complainant company or that he is aware or conversant with the facts which are alleged in the complaint. It is argued that those details are stated in the complaint. But, complaint is not evidence. It contains allegations and not facts.

7. The allegation in the complaint does not constitute evidence. The complaint in this case is signed by the complainant, but PW1 has no case that the complaint is even signed by him. Complaint is defined under Section 2(d) of Code of Criminal Procedure and it means, allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, etc. Therefore, complaint is only a statement of allegation made in writing to a Magistrate by the complainant and 'evidence' means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry.

8. A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. It is clear from the above precisions, particularly with reference to the interpretation

clause in Section 3 of Evidence Act that the statement given by a witness before the court constitutes oral evidence. Oral evidence has to be by direct evidence as stated in Section 60 of Evidence Act and proof of fact can be either by oral evidence or by documentary evidence.

9. In this case, what the prosecution is required to prove is that the accused has drawn the cheque. Drawing of the cheque can be proved by oral evidence and by production of document. But, there is nothing in the evidence of PW1 to show that he is, in any way, connected with or has any direct dealing as far as drawing of the cheque is concerned. Situation is same in the case of incurring of debt. Nothing has been produced to prove whether as per accounts, accused had any debt in favour of complainant company, though in Ext.P4 notice it is stated that the cheque is referred to in the statement of account. At any rate, evidence of PW1 is totally insufficient to prove the allegations in the complaint. It is not sufficient that any person mounts the witness box and speak some facts. It is only if the court is satisfied that such statement constitute evidence as per law. But there is no evidence to prove the execution of cheque or incurring of debt.

10. This case is of the year 1998. The complainant is a company who had legal assistance of a counsel. The records shows that the alleged transaction occurred as early as in 1996, about ten years back. There is

no case for complainant that he was not able to prosecute the case for want of any lack of proper legal advice or assistance. In the above circumstances, I find that it may not be just and proper to give any more opportunity to complainant to prove its case. Both the courts below failed to consider that the facts required to be proved in an offence under Section 138 of the Act were actually not proved in this case.

11. Therefore, the accused cannot be convicted, in the absence of ingredients of offence under Section 138 of the Negotiable Instruments Act. The conviction passed against revision petitioner is unsustainable. The sentence imposed is fine. The maximum sentence which could be imposed by a Judicial Magistrate of First Class was Rs.5,000/- at the relevant time. The sentence imposed in this case is also illegal and unsustainable.

12. In the result, conviction and sentence passed against revision petitioner are set aside. He is found not guilty and is acquitted of offence under Section 138 of the Negotiable Instruments Act. He is set at liberty forthwith.

This revision petition is allowed.

K. HEMA, JUDGE.

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